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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HOWELL, Defendant and Appellant.	B145239 (Super. Ct. No. TA102354)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Affirmed in part; reversed in part with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Robert Howell, appeals from his convictions for: second degree murder (Pen. Code,[1] § 187, subd. (a)); four counts of attempted, willful, deliberate, and premeditated murder (§§ 664, 187); and three counts of assault with a semiautomatic firearm. (§ 245, subd. (b).) The jury further found defendant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). The jury also found as to the murder and attempted murder counts, defendant personally and intentionally discharged a firearm in the commission of the murder and attempted murders. (§§ 12022.53, subds. (b), (c), and (d), 12022.5, subd. (a)(1).) Defendant argues: there was insufficient evidence to support his convictions for willful, deliberate, and premeditated attempted murder; the trial court improperly instructed the jury regarding the specific intent to kill; his sentence constitutes cruel and unusual punishment; the trial court abused its discretion in sentencing him to consecutive sentences; and the abstract of judgment must be corrected to more accurately reflect the sentence imposed. We address several sentencing and clerical errors. We order resentencing on count 6 and corrections of the abstract of judgment. In all other respects, the judgment will be affirmed.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Opposing Black and Hispanic gangs co-existed in the Compton area with Rosecrans Boulevard as the boundary between them. Each gang had been involved in murders and shootings against one another. Defendant was a member of one of the gangs. On July 11, 1999, Jose Perez,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Sr., his wife Juana Gomez, and their sons, Jose Perez, Jr. (Jose) and David Hernandez were eating outdoors at a restaurant on Rosecrans Boulevard. Serafin Maciel, a brother, and two friends were also eating at a nearby outdoor table. Mr. Maciel saw defendant walk past the restaurant. Approximately five minutes later, defendant fired multiple gunshots from the driveway of the restaurant. Twelve-year-old Jose was shot in the head and died two days later. Defendant moved closer to the restaurant, shouted something, fired two more shots, and then left. Mr. Maciel and his companions fled. They drove away from the restaurant in Mr. Maciel's car. Later that day, Mr. Maciel discovered seven bullet holes in the back of his car.

Miguel Morales was riding a bicycle near the restaurant at the time of the shooting. He heard the shots coming from the area near the restaurant. Mr. Morales saw defendant run from the restaurant. Defendant was carrying something in his left hand that looked like a shirt. Mr. Morales positively identified defendant from a photograph lineup and at trial. Mr. Perez also selected defendant's photograph from a photographic lineup.

Compton Police Detective Duane Bookman investigated the July 11, 1999, shooting. Detective Bookman collected 10 nine-millimeter expended casings and 1 nine-millimeter copper bullet from the scene. The casings were later determined to have been fired from the same firearm. The firearm was most likely a semiautomatic weapon.

On July 22, 1999, Compton Police Detective Timothy Brennan interviewed defendant. Following his waiver of rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445, defendant confessed. A videotape of the confession was played for the jury at trial. Defendant stated there had been a meeting of his gang prior to July 11, 1999, at a local park. A collection was taken up to buy guns in order "to take care of" the rival gang. Defendant stated the rival gang was "constantly shooting at me everyday and shooting at my homeys everyday." Defendant said he was at a location known as "the spot" on July 11, 1999. "The spot" was a place where "dope" was sold. Some of those present indicated rival gang members were at the nearby restaurant. Someone asked, "[W]ho gonna put in some work?" Defendant said he would do it. Everyone else was

scared. Defendant got a nine-millimeter automatic handgun from another gang member at a nearby carwash. One gang member stood as a lookout nearby, while another blocked traffic with his truck. As defendant walked past the restaurant, he saw the rival gang members. He recognized one individual. Defendant knew the person as "Woody." This individual had tattoos on his eyebrows. Defendant turned around and began firing. Defendant told Detective Brennan, "[T]hen I'm trying to get them." Defendant admitted trying to hit "Woody." Defendant fired approximately 16 times. Defendant saw people screaming and ducking. He ran down the street, through someone's backyard. Another gang member picked defendant up. Defendant gave the gang member the gun. The gun was in turn given back to another gang member at the car wash. Defendant was dropped off at his grandmother's home. Defendant learned later that day that a 12-year-old boy had been shot.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his attempted murder convictions because there was no evidence he intended to kill any of the four individuals. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993)

6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer*, *supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Intent to kill is a necessary element of attempted murder. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *People v. Osband, supra,* 13 Cal.4th at p. 683; *People v. Swain* (1996) 12 Cal.4th 593; *People v. Collie* (1981) 30 Cal.3d 43, 62; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Defendant argues the evidence did not demonstrate he had an intent to kill. Rather, defendant argues, "[T]he fact [that] none of the men at the table were struck supports the inference [defendant] was shooting wildly, with no deliberate intention of hitting anyone, much less killing them." Our colleagues in Division Two of this appellate district have held: "One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. . . ." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946; accord, *People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690.)

In this case, defendant, by his own admission, fired some 16 shots in the direction of 4 rival gang members, who were eating at a restaurant patio occupied by other patrons. There was a history of shootings and killings between defendant's gang and a neighboring Hispanic gang. The members of defendant's gang had: met; collected money for guns; and planned how they would "get" the opposing gang. On the day of the incident, defendant volunteered to "put in some work." Detective Brennan testified that based on his 18 years experience with gangs in the Compton area, he understood the term

"put in work" to mean, "[I]t's to go to that gang's neighborhood and shoot at them." Defendant deliberately: walked to the car wash to get the gun; walked past the restaurant once to locate the rival gang members; returned; and began shooting. In defendant's words: "Then I start firing. Firing at them. Then they start ducking and stuff. And then I'm trying to get them." Defendant also explained: "I was trying to get the [rival gang members]. I wasn't trying to shoot no little kid. . . . And I been shot at too many times. They try to kill me everyday. And I was trying to shoot them, too. I guess I didn't get the person that I wanted." In explaining that one of his gang members stood on the corner as a lookout while another blocked traffic with his truck, defendant stated, "That's when I walked in and start shooting at the person that was trying to shoot me."

The California Supreme Court has held that where shots are fired at point-blank range there is a strong inference that a killing was intentional. (See *People v. Jackson* (1989) 49 Cal.3d 1170, 1201; *People v. Bloyd* (1987) 43 Cal.3d 333, 348-349.) In this instance, the fact that the bullets missed their mark was a result of good fortune on the intended victims' part; not legally ponderable evidence concerning defendant's mens rea. The evidence was sufficient to allow the jury to determine that defendant had the intent to kill Mr. Maciel and his three companions. (See also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463-1464; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1436-1437 [a defendant who fired five shots at close range from a moving automobile at three individuals was found to have intended to kill all three]; *People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690 [the firing of a single bullet in the direction of two police officers in close proximity to one another would allow a reasonable jury to infer that the defendant intended to kill both].)

We also agree with the Attorney General that there was substantial evidence to support the jurors' findings the attempted murders were willful, deliberate, and premeditated. Section 664, subdivision (a), provides: "[I]f the crime attempted is willful, deliberate, and premeditated murder . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." As both defendant and the Attorney General acknowledge, the California Supreme Court in

People v. Anderson (1968) 70 Cal.2d 15, 26, identified three categories of evidence available to sustain a finding of premeditated murder; namely, planning, motive, and intent. The Supreme Court later clarified, "The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 768; *People v. Sanchez* (1995) 12 Cal.4th 1, 32.) The *Perez* court emphasized that on review the appellate court should focus on the evidence presented and all logical inferences drawn therefrom. (*People v. Perez, supra,* 2 Cal.4th at pp. 1124, 1125.)

Here, as noted previously, the gang to which defendant belonged had planned their revenge by purchasing guns and conspiring to "get" their rivals. Defendant volunteered to do the "work" of the gang. Defendant successfully obtained a semiautomatic weapon. Defendant made a sweep past the restaurant in order to identify his targets. Once they were located, defendant returned and began firing at them. Defendant continued to fire approximately 16 shots in the direction of the 4 young men. Defendant had a motive, planned his attack, and intentionally followed through on the plan. During the time that he was carrying out these activities, defendant had ample time to reflect on and to premeditate what he was about to do. Therefore, the jury could reasonably find that the attempted murder of Mr. Maciel and his three companions was willful, deliberate, and premeditated. (*People v. Mayfield, supra,* 14 Cal.4th at p. 769; *People v. Sanchez, supra,* 12 Cal.4th at pp. 32-33; *People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez, supra,* 2 Cal.4th at pp. 1125-1126; *People v. Thomas* (1992) 2 Cal.4th 489, 516-517.)

B. Instructions

Defendant argues the trial court improperly instructed the jury regarding the requisite intent to kill with respect to counts 2 through 5. He argues the trial court should have modified CALJIC No. 8.66 to require, "that the jury find [he] specifically intended to kill each one of the four victims." He suggests that the jury may have relied on a

theory of transferred intent. Defendant further argues the evidence only demonstrated he "had the motivation to harm one of the four alleged victims." We disagree.

The trial court instructed the jury with CALJIC No. 8.66 as follows: "The defendant is accused in counts 2, 3, 4, and 5 of having committed the crime of attempted murder in violation of 6 -- excuse me, section[s] 664 and 187 of the Penal Code. Every person who attempts to murder another human being is guilty of violation of Penal Code section[s] 664 and 187. Murder is the unlawful killing of a human being with malice aforethought. In order to prove attempted murder, each of the following elements must be proved: No. 1, a direct but ineffectual act was done by one person towards killing another person -- another human being, and No. 2, the person committing the act harbored express malice aforethought; namely, a specific intent to kill unlawfully another human being. In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation on one hand and the actual commencement of the doing of the criminal deed on the other. Mere preparation, which may consist of planning, which may consist of planning the killing or of devising obtaining or arranging the means of its commission is not sufficient to constitute an attempt. However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstance not intended in the original design."

The trial court further instructed the jury with CALJIC No. 8.67 as set forth in pertinent part: "It is also alleged in counts 2, 3, 4, and 5, that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. . . . 'Willful[]' means intentional[.] ['']Deliberate['] means formed or arrived at or determined upon the result of careful thought and weighing of consideration for and against a proposed course of action. 'Premeditated[]' . . . means considered beforehand. If you find that the attempted murder is preceded and accompanied by a clear and deliberate intent to kill, which was a result of deliberation and premeditation so that it

must have formed upon pre-existing reflection and not upon -- excuse me, not under a sudden heat of passion or other condition including the idea of deliberation[,] it is an attempt to commit willful, deliberate, and premeditated murder. . . . To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a course, and having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being. . . ." In addition, the jury was instructed regarding the requirement of a concurrence of the act and specific intent or mental state pursuant to CALJIC Nos. 3.31 and 3.31.5.

Defendant did not request that these instructions be amplified, clarified, or modified to include a requirement that the intent be specific as to each alleged victim. The California Supreme Court has held that in the absence of such a request for an amplifying instruction by the defendant, "the trial court is under no duty to give such an instruction sua sponte." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189; *People v. Dennis* (1998) 17 Cal.4th 468, 514; *People v. Hamilton* (1988) 46 Cal.3d 123, 146; see also *People v. Johnson* (1993) 6 Cal.4th 1, 52 [failure to request clarifying instructions bars appellate review of the issue].) In addition, the California Supreme Court has determined that where an additional instruction is duplicative of one or more others, it need not be given. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079 overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12.) The instructions given adequately addressed the issue of specific intent as it related to each count and therefore each intended victim. We agree with the Attorney General that a reasonable juror would have understood he or she had to separately find the requisite elements as to each of the four victims. (See *People v. Dennis, supra,* 17 Cal.4th at p. 515; *People v. Berryman, supra,* 6 Cal.4th at p. 1078.) In addition, the transferred intent instruction given in CALJIC No. 8.65 related only to an individual who was actually murdered. CALJIC No. 8.65 was given as follows: "When one attempts to kill a certain person but by mistake or inadvertence kills a different

person, the crime, if any, so committed is the same though the person originally intended to be killed had been killed." We therefore find no error.

In addition, it is not reasonably probable that a judgment more favorable to defendant would have resulted had the instruction been given. (*People v. Osband*, *supra*, 13 Cal.4th at pp. 685-686; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence established that defendant fired the shots at the four rival gang members. Defendant acknowledged that the other three individuals were members of the rival gang from another area. Defendant said, "Them other fools . . . they probably . . . they from [rival gang] but they be in Paramount." Defendant admitted: "[He] was trying to get the [rival gang members]. . . . They try to kill me everyday. And I was trying to shoot them, too."

C. Sentencing

1. Sentence of 154 years to life

Defendant argues the trial court's application of section 12022.53, subdivision (d), is so grossly disproportionate as to violate the United States and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) Defendant's argument is meritless. The California Constitution, article I, section 17, prohibits the imposition of cruel or unusual punishment. However, in order to constitute cruel or unusual punishment, the California Supreme Court has determined that a sentence must be "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; *People v. Frierson* (1979) 25 Cal.3d 142, 183.) The California Supreme Court found that in administering that rule, reviewing courts should: look to the nature of the offense and the offender; compare the punishment with the penalty for more serious crimes in the same jurisdiction; and compare the punishment to the penalty for the same offense in different jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427.) The California Supreme

Court has also emphasized that the defendant must overcome a considerable burden in challenging a penalty as cruel and unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) As our colleagues in Division Four of this appellate district recently noted: "'The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]'" (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 16, quoting *People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Defendant argues that despite Jose's tragic death, there were no injuries to other individuals. Defendant also argues: he was 17 years old when the shootings occurred; had a juvenile record, but no history of violent or serious felonies; his mother had been a drug user before her death; and he had learning impairments. He further argues he had a great degree of remorse and despair. However, the evidence paints a more serious picture. Defendant, by his own admission, was caught up in a gang culture, which revolved around power and revenge. Defendant did not hesitate to fire 16 or more shots from a semiautomatic weapon at a group of people, including innocent bystanders. Defendant's purpose was to "get" the opposing gang members. It was only his poor aim that saved the lives of others. Defendant's participation was voluntary and aggravated. At the time of sentencing, the trial court noted that it had read and considered the probation officer's report as well as the entire case prior to ruling on the new trial motion and sentencing. The probation officer's report noted that defendant had an extensive juvenile history for property, drug, and weapon-related offenses. The report further indicated defendant was deeply entrenched in the gang subculture, had been afforded the opportunity for diversion, suitable placement and camp-community placement, but rejected all efforts to assist him. Defendant was on probation at the time of his arrest. Defendant's personal misfortunes and lack of history of serious felony convictions were outweighed by the gravity of the offenses and the circumstances surrounding its

commission. In fact, the Legislature specifically determined that those who use firearms in the commission of the felonies designated in section 12022.53 pose such a danger that substantially longer prison sentences must be imposed. (*People v. Martinez, supra*, 76 Cal.App.4th at p. 497.)

The nature of the offenses and the offender supports imposition of: a 40-year-to-life sentence on count 1; consecutive sentences of life with the possibility of parole plus 20 years on each of counts 2, 3, 4, and 5; and consecutive sentences of 2 years for each of counts 6, 7, and 8. (See *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415-1416, overruled on another point in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8 ["Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security."].) Defendant's sentence is not grossly disproportionate to the offenses and no constitutional violation has occurred. (*Rummel v. Estelle* (1980) 445 U.S. 263, 268; *Spencer v. Texas* (1967) 385 U.S. 554, 559-560; *People v. Gonzales, supra,* 87 Cal.App.4th at p. 16; *People v. Martinez, supra*, 76 Cal.App.4th at p. 497.)

2. Consecutive terms

Defendant argues the trial court abused its discretion in imposing consecutive sentences, resulting in a term of 154 years to life. Defendant's argument has no merit. The trial court stated: "The court has considered the criteria affecting the imposition of concurrent or consecutive sentences, as set out in Rule 425. [¶] The crimes alleged in counts II, III, IV, V, VI, VII, and VIII involved separate acts of violence and threats of violence. Based on these findings, the sentence is, for the offenses alleged in counts II, III, IV, V, VI, VII, and VIII, are ordered to be served consecutive to each other, and consecutive to the term of imprisonment imposed for count I." The criteria in former rule 425 of the California Rules of Court is are now set forth in rule 4.425. We note that there was no requirement that reasons be stated for ordering indeterminate sentences to run consecutively. Indeterminate sentences are not subject to the determinate sentencing law.

(*People v. Felix* (2000) 22 Cal.4th 651, 659; *People v. Miles* (1996) 43 Cal.App.4th 364, 370-371, fn. 6; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1833.) But no abuse of discretion occurred because the reasons articulated by the knowledgeable and experienced trial judge make good sense.

3. Imposition of one-third of the midterm on all the determinative sentences

As to counts 6 through 8, defendant was convicted of discharging a semiautomatic firearm in violation of section 245, subdivision (b) and he received determinate mid-term of two years as to each count. The victims in counts 6 through 8 were different from those in counts 1 through 5. The trial court imposed the two-year mid-term as to each count in the apparent belief that one of the indeterminate terms was a principal term within the meaning of section 1170.1, subdivision (a).[2] However, an indeterminate term may not serve as a principal term under the determinate sentencing law. (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856-857; *People v. Day* (1981) 117 Cal.App.3d 932, 936-937; see *People v. Garcia* (1997) 59 Cal.App.4th 834, 838; § 1170.1, subd. (a).) Therefore, the mid-term sentence as to count 6 must be reversed. Upon issuance of the

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[2] Section 1170.1, subdivision (a) states in pertinent part: "[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

remittitur, the trial court is to resentence defendant as to count 6 and select 1 of the 3 determinate terms of 3, 6, or 9 years.

4. Correction of abstract of judgment

Defendant argues and the Attorney General concedes that the abstract of judgment inaccurately reflects the sentence imposed for the second-degree murder conviction in count 1. The abstract of judgment indicates the term for count 1 was life without the possibility of parole, when, in fact, the term was life with the possibility of parole. In addition, the trial court imposed 20-year enhancements pursuant to section 12022.53, subdivision (c), as to counts 2, 3, 4, and 5. However, the abstract of judgment does not reflect those 20-year terms. The abstract of judgment must be corrected to reflect the imposition of the 20-year terms. California Rules of Court, rule 12, subdivision (b) provides in pertinent part: "If any material part of the record . . . is incorrect in any respect, . . . the reviewing court, on suggestion of any party or on its own motion, may direct that it be corrected . . . ." As a general rule, the record will be harmonized when it is conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) "'[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.'" (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at page 452; see also *In re Daoud* (1976) 16 Cal.3d 879, 882, fn. 1 [trial court could properly correct a clerical error in a minute order nunc pro tunc to conform to its oral statement of that date if there was a discrepancy between the two]; § 1207; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [appellate court may order trial judge to correct discrepancy between the judgment and the abstract of judgment].) We order the clerk of the superior court to correct the abstract of judgment and forward a corrected copy to the Department of Corrections.

IV. DISPOSITION

The two-year midterm sentence is reversed as to count 6. The matter is remanded for limited resentencing as to count 6. After the resentencing, the superior court clerk shall prepare a corrected and amended abstract of judgment as set forth above and forward a copy to the Department of Corrections. The abstract of judgment must include the 20-year terms imposed as to counts 2, 3, 4, and 5. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.